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VIA ELECTRONIC MAIL

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The Honorable Denise L. Cote
 United States District Judge
 United States District Court for the Southern District of New York
 500 Pearl Street, Room 1610
 New York, New York 10007-1312

Re: United States v. Apple Inc., 12 Civ. 2826 (DLC), Texas v. Penguin Group (USA) Inc.,
 12 Civ. 3394 (DLC)

Dear Judge Cote:

We represent Apple. At the pre-trial conference last week, the Court granted Apple's motion *in limine* with respect to the testimony of Plaintiff States' expert, Dr. Baker, "to the extent that [he] offers his opinion that the defendant publishers . . . likely acted in a coordinated way." Final Pre-Trial Hearing Tr. 42:22-25. We have reviewed the revised expert declaration of Dr. Baker that the Plaintiff States submitted to the Court yesterday. We write to provide the Court with our objections to certain portions of this revised testimony that fail to comply with the Court's ruling and continue to run counter to the holdings of other courts.

Plaintiff States have paid lip service to the Court's ruling by cosmetically deleting around fifty instances (or variations) of the word "coordination." But the objectionable aspect of Dr. Baker's testimony has not been erased. Rather, paragraph 1 confirms that nothing of substance has changed: "my conclusions with respect to coordination" relate to a specially defined "economic concept" and "should not be understood as taking a position" regarding "unlawful agreement." Baker Revised Direct ¶ 1. In short, "coordination" is *different from collusion*. As Dr. Baker explains in his textbook on antitrust law: "coordinated competitive effects also include the threat of higher prices resulting from 'conscious parallelism' and price leadership which . . . can have the same economic consequences as price-fixing without involving conduct that would satisfy the 'agreement' requirement of Sherman Act §1." Gavil, Kovacic & Baker, *Antitrust Law in Perspective* (2008) at 518.

Receiving evidence about the likelihood of "*coordination*" cannot help — and instead would affirmatively mislead — the Court in assessing whether the economic evidence shows a likelihood of *collusion*. Dr. Baker's proffered testimony on "coordination" is precisely the sort of opinion that has been excluded by the courts. In *Williamson Oil Co. v. Philip Morris*

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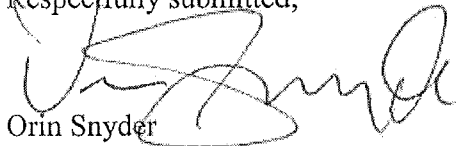
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USA, 346 F.3d 1287, 1322 (11th Cir. 2003), a case that is squarely on point, the Eleventh Circuit affirmed the exclusion of plaintiffs' expert opinion as irrelevant in an antitrust conspiracy case precisely because the expert did not differentiate between lawful behavior and collusive price-fixing. Dr. Baker's opinions too do "not differentiate between legal and illegal [] behavior, and instead simply group[] both of these phenomena under" one umbrella. *Williamson Oil*, 346 F.3d at 1323. For this reason, his testimony does not "aid[] a finder of fact to determine whether [defendant's] behavior was or was not legal." *Id.*

Cosmetic changes which merely delete explicit instances of the word "coordination" from Dr. Baker's testimony, while leaving his testimony substantively intact, do not render it admissible. To provide one example, the Court explained that paragraph 67 of Dr. Baker's testimony was "inappropriate." Tr. 43:2-4. In substance, that paragraph remains unchanged in the revised testimony; the addition of the phrase "Accordingly, as an economic matter" does not cure its defects. Elsewhere, Dr. Baker devotes an entire section of his testimony to describe the framework he employs in order to assess "whether the defendant publishers engaged in coordinated conduct." *Id.* at ¶¶ 64-69. In fact, over 50 paragraphs of Dr. Baker's testimony continue to fall under headings explicitly touching on "coordination." Plainly, in contravention of the Court's ruling, the great bulk of Dr. Baker's testimony continues to focus on the likelihood that defendant publishers engaged in "coordinated conduct" and that Apple facilitated such "coordination."

The following paragraphs of Dr. Baker's revised testimony relate to "coordinated conduct" and are objectionable: 1,7-10, 24-38, 51-62, 64, 67-69, 71-76, 78-98, 100, 102-105, 107-113, 120, 145 and 147-149. Apple respectfully requests that the Court exclude the identified testimony from Dr. Baker's trial testimony.

Respectfully submitted,



Orin Snyder

cc: All Counsel